

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

JOHN R. ATCHLEY, a married man,
Plaintiff,

v.

PEPPERIDGE FARM, INC., a
Connecticut corporation,
Defendant.

MICHAEL GILROY, a married man,
Plaintiff,

v.

PEPPERIDGE FARM, INC., a
Connecticut corporation,
Defendant.

No. CV-04-452-FVS

ORDER RE: SUMMARY JUDGMENT
MOTIONS

No. CV-04-453-FVS

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BEFORE THE COURT is Defendant's Motion for Summary Judgment Dismissal (Ct. Rec. 133 in CV-04-452-FVS; Ct. Rec. 128 in CV-04-453-FVS) and Plaintiffs' Motion for Summary Judgment (Ct. Rec. 118 in CV-04-452-FVS; Ct. Rec. 113 in CV-04-453-FVS). The Court heard oral argument on these motions on March 10, 2006. Plaintiffs were represented by Daniel Tiffany. Defendant was represented by Rich Kuhling.

I. BACKGROUND

Defendant Pepperidge Farms, Inc. ("PFI") is a producer of baked goods, which it sells in retail food stores throughout the United

1 States. PFI consigns its products to independent distributors who
2 market and deliver it to retail outlets. In March 2003, the
3 *Spokesman Review* ran an advertisement for the sale of the "North
4 Spokane to Colville" PFI distributorship for the sale price of
5 \$229,500.00. The parties dispute who advertised this sale; PFI or
6 the owner of the distributorship, Mr. Spangler. Nonetheless, it is
7 undisputed that Mr. Gilroy answered the advertisement by calling the
8 number listed and speaking to Mr. Spangler. However, thereafter Mr.
9 Gilroy was referred to PFI representatives to discuss the sale of Mr.
10 Spangler's distributorship. Mr. Gilroy purchased the North Spokane
11 to Colville PFI Distributorship for \$299,000.00. He paid 10 percent
12 down and financed the remainder. He paid the purchase price in the
13 form of a \$269,550 check from Bank of America, a \$4,450 check from
14 Sterling Savings Association and an additional \$25,500 personal
15 check. Bank of America disbursed a check in the amount of
16 \$269,550.00 made payable to "David Spangler and Pepperidge Farm,
17 Inc." The check was made payable jointly to Mr. Spangler and PFI in
18 order to pay off Mr. Spangler's bank loan to Bank of America, which
19 PFI guaranteed, and to ensure that Mr. Spangler paid the outstanding
20 balance he owed PFI.

21 PFI also advertised the sale of a second distributorship in an
22 area described as "Spokane Valley and Northern Idaho" for
23 \$365,508.00. The previous owner, Mr. Godwin, abandoned his route,
24 forcing PFI to offer it for sale on behalf of Mr. Goodwin. Mr.
25 Atchley met with PFI employee Rick Allesio to discuss the purchase
26 of this distributorship. Mr. Atchley paid a \$25,000 down payment to

1 PFI and financed the remainder of the purchase amount of \$200,000
2 through Bank of America. The down payment was applied to Mr.
3 Goodwin's account and he ultimately received net proceeds from the
4 sale of his distributorship after paying his bank loan debt of
5 \$173,638.67, which was guaranteed by PFI.

6 At the time of their purchases, both Plaintiffs entered into a
7 Consignment Agreement with PFI, granting Plaintiffs the "exclusive
8 right to distribute [PFI] Consigned Products to retail stores" within
9 their respective territories. The Consignment Agreement also granted
10 Plaintiffs the right to use PFI's trade name, trademark and
11 distinguishing colors on Plaintiffs' vehicles and equipment pursuant
12 to the conditions set forth in the Consignment Agreement.

13 **II. PROCEDURAL HISTORY**

14 In November 2004, Plaintiffs each filed separate actions in
15 Spokane County Superior Court against Defendant for rescision of
16 contract and damages for breach of contract, misrepresentation, and
17 violation of Washington's Franchise Investment Protection Act. PFI
18 removed both actions to this Court and the cases were set on the same
19 briefing schedule, but have not been consolidated.

20 Plaintiffs previously moved for partial summary judgment and
21 rescission of their contracts with PFI on the basis that PFI violated
22 of the Washington Franchise Investment Protection Act ("FIPA"), RCW
23 19.100 et seq. On May 20, 2005, the Court denied Plaintiffs' motions
24 on the basis that they had not shown they paid a "franchise fee" when
25 they purchased their distributorships. Plaintiffs now renew their
26 motion for partial summary judgment, arguing the new evidence shows

1 Plaintiffs paid numerous indirect or hidden franchise fees. PFI
2 cross claims for summary judgment on Plaintiffs' FIPA claim and seeks
3 summary judgment dismissal of Plaintiffs' remaining causes of action
4 for violation of the Washington Business Opportunity Fraud Act
5 ("BOFA"), misrepresentation, and breach of contract.

6 **III. DISCUSSION**

7 **A. Summary Judgment Standard**

8 A moving party is entitled to summary judgment when there are no
9 genuine issues of material fact in dispute and the moving party is
10 entitled to judgment as a matter of law. Fed.R.Civ.P. 56; *Celotex*
11 *Corp. v. Catrett*, 477 U.S. 316, 323, 106 S.Ct. 2548, 2552 (1986). "A
12 material issue of fact is one that affects the outcome of the
13 litigation and requires a trial to resolve the parties' differing
14 versions of the truth." *S.E.C. v. Seaboard Corp.*, 677 F.2d 1301,
15 1306 (9th Cir. 1982). Inferences drawn from facts are to be viewed
16 in the light most favorable to the non-moving party, but that party
17 must do more than show that there is some "metaphysical doubt" as to
18 the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475
19 U.S. 572, 586-87, 106 S.Ct. 1348, 1356 (1986). There is no issue for
20 trial "unless there is sufficient evidence favoring the non-moving
21 party for a jury to return a verdict for that party." *Anderson v.*
22 *Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511 (1986).
23 A mere "scintilla of evidence" in support of the non-moving party's
24 position is insufficient to defeat a motion for summary judgment.
25 *Id.* at 252, 106 S.Ct. at 2512. The non-moving party cannot rely on
26 conclusory allegations alone to create an issue of material fact.

1 *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993). Rather,
 2 the non-moving party must present admissible evidence showing there
 3 is a genuine issue for trial. Fed.R.Civ.P. 56(e); *Brinson v. Linda*
 4 *Rose Joint Venture*, 53 f.3d 1044, 1049 (9th Cir. 1995). An issue of
 5 fact is genuine if the evidence is such that a reasonable jury could
 6 return a verdict for the nonmoving party. *Anderson*, 477 U.S. at 248,
 7 106 S.Ct. at 2510. "If the evidence is merely colorable...or is not
 8 significantly probative,...summary judgment may be granted." *Id.* at
 9 249-50, 106 S.Ct. at 2511 (citations omitted).

10 **B. Franchise Investment Protection Act (FIPA)**

11 To state a claim under the FIPA, the arrangement between the
 12 parties must meet the statutory definition of a franchise. To
 13 establish that their agreements with PFI constituted a franchise,
 14 Plaintiffs must demonstrate (1) PFI granted Plaintiffs the right to
 15 distribute goods under a marketing plan substantially provided by
 16 PFI; (2) operation of Plaintiffs' business was substantially
 17 associated with PFI's trademark; and (3) Plaintiffs paid PFI a
 18 franchise fee. See RCW 19.100.010(4). "Franchise fee" is defined as

19 any fee or charge that a franchisee or subfranchisor is
 20 **required to pay or agrees to pay for the right to enter**
 21 **into a business or to continue a business** under a franchise
 22 agreement, including, but not limited to, the payment
 23 either in lump sum or by installments of an initial capital
 24 investment fee, any fee or charges based upon a percentage
 25 of gross or net sales whether or not referred to as royalty
 26 fees, any payment for the mandatory purchase of goods or
 services or any payment for goods or services available
 only from the franchisor, or any training fees or training
 school fees or charges; however, the following shall not be
 considered payment of a franchise fee (a) the purchase or
 agreement to purchase goods at a bonafide wholesale price
 (b) the purchase or agreement to purchase goods by
 consignment; if, and only if the proceeds remitted by the

1 franchisee from any such sale shall reflect only the bona
2 fide wholesale price of such goods; (c) a bona fide loan to
3 the franchisee from the franchisor; (d) the purchase or
4 agreement to purchase goods at a bona fide retail price
5 subject to a bona fide commission or compensation plan that
6 in substance reflects only a bona fide wholesale
7 transaction; (e) the purchase or lease or agreement to
8 purchase or lease supplies or fixtures necessary to enter
9 into the business or to continue the business under the
franchise agreement at their fair market or rental value;
(f) the purchase or lease or agreement to purchase or lease
real property necessary to enter into the business or to
continue the business under the franchise agreement at the
fair market or rental value; (g) amounts paid for trading
stamps redeemable in cash only; (h) amounts paid for
trading stamps to be used as incentives only and not to be
used in, with, or for the sale of any goods.

10 RCW 19.100.010(12) (emphasis added). The statute suggests that a
11 franchise fee includes "fees hidden in the franchisor's charges for
12 goods or services." *Corp. v. ARCO*, 45 Wash. App. 563, 568, 726 P.2d
13 66 (1986) (holding that payments for the rental of property not at
14 fair market value will constitute a franchise fee). Washington
15 courts have recognized that a franchise fee may be indirect,
16 including fees for goods or services. For example, a Washington
17 court found that a franchise existed where a principle admitted that
18 initial charges to the agent included cost recovery for training and
19 marketing costs. *Lobdell v. Sugar 'N Spice, Inc.*, 33 Wash. App. 881,
20 892, 658 P.2d 1267 (1983) (holding that charges for the cost of
21 finding retail locations, and company advertising and training may
22 constitute a hidden franchise fee). Similarly, a franchise was found
23 where the franchisor charged the franchisee rent for use of the
24 premises based on a percentage of gross revenues rather than any
25 estimation of fair market value of the premises. *Corp v. Atlantic-*
26 *Richfield Co.*, 45 Wash. App. 563, 569, 726 P.2d 66 (1986); see also

1 *Blanton v. Mobil Oil Corp.*, 721 F.2d 1207, 1220 (9th Cir. 1983)
2 (mandatory purchases of motor oil and other products constituted
3 franchise fee). However, a franchise fee was not found where the
4 purported franchise agreement allowed for a fixed rate to be paid to
5 the agent, while a markup was retained by the principle. See e.g.,
6 *Corporate Resources, Inc. v. Eagle Hardware & Garden, Inc.*, 115 Wash.
7 App. 343, 350, 62 P.3d 544 (2003) (holding that profit margins on
8 installation contracts are not characterized as an indirect franchise
9 fee under FIPA).

10 In Plaintiffs' original motion for summary judgment they argued
11 the purchase prices they paid for their distributorships constituted
12 a franchise fee because they paid for the "right to enter into
13 business" with PFI. In response, PFI argued Plaintiffs both
14 purchased a distributorship, not the right to enter into a
15 distributorship, and that Plaintiffs each purchased a PFI
16 distributorship that was owned by the predecessor distributor, not by
17 PFI. The Court denied Plaintiffs' motions, holding that the purchase
18 prices did not constitute franchise fees because Plaintiffs did not
19 show they made any unrecoverable investment with PFI or that their
20 predecessors, Mr. Spangler and Mr. Goodwin, had paid any
21 unrecoverable investment to PFI.

22 Plaintiffs now renew their motion for summary judgment on the
23 basis that they have discovered other "hidden" or "indirect"
24 franchise fees they were required to pay to PFI "for the right to
25 enter into a business or to continue a business" with PFI. See RCW
26 19.100.010(12). Plaintiffs list five categories of fees they contend

1 constitute franchise fees: (1) required purchase of PFI stale
2 products; (2) mandatory participation in the pallet delivery program;
3 (3) hand held maintenance program fees; (4) extra consideration paid
4 by John Atchley; and (5) service charges. Additionally, Plaintiffs
5 argue the sum of all of these fees and/or charges constitute a
6 franchise fee.

7 1. Required Purchase of PFI Stale Products

8 Pursuant to their Consignment Agreements, Plaintiffs, like other
9 distributors, were required to remove from their assigned stores all
10 "damaged and overcode (over-age) items." In the industry, products
11 whose shelf life had expired were referred to as stale products.
12 Pursuant to the Consignment Agreement, Plaintiffs were permitted to
13 sell stale products only to stores dealing exclusively in stale
14 products (Grocery Outlets). The stale products were not returnable
15 to PFI for credit unless specific written permission was granted.
16 PFI's policy of allowing distributors to sell their stale products to
17 Grocery Outlets was designed to provide equitable relief to the
18 distributors from the potential burden of stale products. On August
19 4, 2003, PFI instituted a new "1% Stale Policy" under which
20 distributors were no longer allowed to deliver stale products to
21 Grocery Outlets in any fiscal period, in excess of one percent of the
22 distributor's total sales in that fiscal period. This one percent
23 credit limit for returns on stale products generally tracked the
24 actual region-wide experience for the year prior to the
25 implementation of the Stale Policy. Plaintiffs argue the Stale
26 Policy created a "fee" for stale products because distributors were

1 charged for any stale product delivered to a Grocery Outlet in excess
2 of the one percent limit. More specifically, Plaintiffs argue the
3 consignment of PFI products became a sale upon the implementation of
4 the Stale Policy because under that new policy Plaintiffs were
5 obligated to buy and pay for the delivered goods that were not sold
6 before their expiration date.

7 A franchise fee includes "any fee or charges based upon a
8 percentage of gross or net sales [or] any payment for the
9 mandatory purchase of goods or services available only from the
10 franchisor...." RCW 19.100.010. Plaintiffs argue the Stale Policy
11 could qualify under either of these specific examples of franchise
12 fees. No evidence supports the contention that under the Stale
13 Policy Plaintiffs were required to pay a fee based upon their total
14 gross or net sales. Further, the Court concludes that the Stale
15 Policy does not fit within the second definition of a franchise fee
16 because such policy does not require a "mandatory purchase of goods
17 or services." Although Plaintiffs argue they were "required to make
18 a payment for the mandatory purchase of goods" by eating their lost
19 profit from sale product, Plaintiffs were never required to purchase
20 a set quantity of PFI product. Thus, there was never any "mandatory
21 purchase." The Court recognizes that the Stale Policy shifted some
22 of the burden of stale products from PFI to its distributors, but the
23 policy simply created a method of risk-sharing. Under the Stale
24 Policy, Plaintiffs were responsible for assessing how much product
25 they could stock on the shelves without exceeding their limit of
26 stale product. Although this likely required Plaintiffs to make some

1 changes in their inventory management techniques, it did not create a
2 franchise fee. Rather, Plaintiffs' losses attributable to stale
3 product were merely a business expense inherent in the industry.

4 2. Pallet Delivery Program

5 Plaintiffs also contend the fees they paid for their required
6 participation in PFI's Pallet Delivery Program constitute hidden,
7 indirect franchise fees. PFI maintains that the Pallet Program is a
8 benefit for its distributors, not a franchise fee.

9 During the purchase of their respective distributorships,
10 Plaintiffs each signed an agreement including the following language:
11

12 I understand that from time to time Pepperidge Farm may be
13 requested to deliver Consigned Products to customers in
14 palletized form through their warehouses and/or cross-
15 docking facilities. I hereby request that Pepperidge Farm
16 effect such cross-dock warehouse delivery to these
17 customers for my account pursuant to the Pallet Delivery
18 program in effect at Pepperidge Farm from time to time. I
19 agree to participate in that Pallet Delivery Program and to
20 comply with its terms. I understand and agree that, under
21 such Pallet Delivery program Pepperidge Farm (i) may, at
22 its option, deliver Consigned Products to a customer's
warehouse and/or cross-docking facility for delivery to
retail stores in my territory and (ii) shall pay me an
amount equal to the commissions for the Consigned Products
so delivered to retail stores in my territory computed at
the rate specified in Schedule B of my Consignment
Agreement, less an amount to cover a portion of the costs
incurred in connection with such Pallet Delivery Program
and the delivery of products thereunder. Until further
notice, the amount of that deduction shall not exceed \$30
per pallet.

23 The Pallet Delivery Program exists in part because Paragraph 9
24 of the Consignment Agreement permits PFI to deliver directly to
25 stores who demand that PFI products be delivered shrink-wrapped on
26 pallets and only to their central warehouses, i.e. Costco and Sams

1 Club. Plaintiffs receive a 20 percent commission on the products
2 delivered through the Pallet Delivery Program, less a \$30 fee, which
3 appears to cover the cost of shrink-wrapping the product and
4 delivering it on pallets using forklifts and trucks with hydraulic
5 lifts. Plaintiffs submitted no evidence showing the \$30 service fee
6 was commercially unreasonable or that it exceeded the actual cost of
7 shrink-wrapping and delivery. Therefore, the Court determines the
8 mandatory participation in the Pallet Delivery Program and payment of
9 the \$30 does not constitute a franchise fee because Plaintiffs
10 receive something of equal value in exchange for this payment.

11 3. Maintenance Program Fees

12 When Plaintiffs purchased their respective distributorships,
13 each signed a form agreeing to participate in PFI's maintenance
14 program for the hand-held computer system equipment owned by each
15 distributor. In doing so, Plaintiffs agreed that payment for their
16 participation in the program would be automatically deducted from
17 their accounts on a biweekly basis. Plaintiffs contend these fees
18 fall within the definition of franchise fee. *See e.g., Lobdell*, 33
19 Wash. App. at 892, 658 P.2d 1267 (holding that mandatory charges for
20 the cost of finding retail locations, company advertising and
21 training constituted a hidden franchise fee). In response, PFI
22 submitted evidence showing the computer maintenance fee is optional,
23 not mandatory. Although paragraph 5 of the Consignment Agreement
24 requires each distributor to have the necessary equipment to do the
25 work and to maintain a computer in good and proper working condition,
26 PFI distributors are free to buy their own computers from any source

1 they chose as long as the device is compatible with PFI's system.
2 For those distributors who elect to buy their own computers, PFI
3 provides free computer software. Those distributors who choose to
4 enter into a computer maintenance program receive free computer
5 batteries, flashcards, memory cards, cables, computer paper and
6 loaner equipment with free shipping in the event of computer
7 malfunction.

8 The Court determines that the biweekly fee charged for
9 participating in the maintenance program does not constitute a
10 franchise fee because participation in the program is not mandatory.
11 Although Plaintiffs contend they were led to believe the maintenance
12 agreement was mandatory, this alone does not determine whether the
13 maintenance program fee is a franchise fee.

14 4. Help Line Charges

15 Records attached to Mr. Atchley's declaration reflect that he
16 was assessed numerous \$10.00 fees by PFI. Plaintiffs contend these
17 fees were assessed for calling PFI's help line and that these fees
18 constitute hidden franchise fees because they were fees Plaintiffs
19 were "required to pay ... for the right ... to continue a
20 business...." RCW 19.100.010(12). In response, PFI contends the
21 charges were likely assessed when PFI was required to make a manual
22 invoice adjustment to an order that was submitted in error. PFI
23 assesses charges when a distributor fails to properly report a
24 transaction through his or her handheld computer. According to PFI,
25 all distributors have the ability to avoid these processing charges
26 by properly reporting transactions through their handheld computers

1 and by submitting acceptable proof-of-delivery. Thus, PFI contends
2 the fee, when it occurs, is a transactional cost, not a franchise
3 fee.

4 Plaintiffs submitted no evidence disputing these assertions and
5 the records themselves do not create a material issue of fact with
6 respect to why the fees were assessed. Further, Plaintiffs have
7 submitted no evidence showing the fee charged for PFI's services was
8 unreasonable or not the market price for such services. Moreover,
9 Plaintiffs submitted no evidence showing Mr. Atchley was "required to
10 pay" the \$10 fee in order to continue doing business with PFI.
11 Therefore, the Court concludes Plaintiffs' have failed to show the
12 fees assessed to Mr. Atchley for service charges constitute a hidden
13 franchise fee.

14 5. Extra Consideration

15 In the course of negotiations, Mr. Atchley made two offers.
16 Offer #1 was for \$250,000 "and the 2/Trucks, Printer, Ordering
17 Equipment, etc. that is needed for the operation of the
18 distributorship." Offer #2 was for "\$225,000 for the
19 distributorship" and Mr. Atchley agreed to "purchase equipment needed
20 for the operation of the distributorship." PFI accepted Mr.
21 Atchley's second offer. After an accounting, Mr. Goodwin received
22 \$1,400.24. Thus, Plaintiffs contend PFI received the benefit of the
23 additional consideration agreed to by Atchley (i.e. his agreement to
24 purchase the necessary equipment on is own). Such consideration,
25 Plaintiffs argue, is worth the difference between Mr. Atchley's two
26 offers, or at least \$25,000. Plaintiffs contend this "substantial

1 benefit received only by PFI constitutes indirectly a franchise fee.”

2
3 The evidence submitted to the Court indicates Mr. Atchley
4 purchased equipment directly from Mr. Goodwin, after Mr. Atchley
5 purchased his distributorship. Thus, it appears that what Mr.
6 Atchley terms “extra consideration” was paid directly to Mr. Goodwin.
7 Therefore, the Court concludes Plaintiffs have failed to show PFI
8 received any additional benefit or consideration that constitutes a
9 franchise fee.

10 Because Plaintiffs have failed to demonstrate they paid PFI a
11 franchise fee, Plaintiffs have failed to meet the three-prong FIPA
12 test. Therefore, the Court does not engage in further analysis of
13 the other prongs of the FIPA test because the relationship between
14 Plaintiffs and PFI is not a franchise. Accordingly, with respect to
15 Plaintiffs' FIPA claim, PFI's motion for summary judgment is granted
16 and Plaintiffs' motion for partial summary judgment is denied.
17 Furthermore, since the Court concludes the FIPA is inapplicable,
18 rescission is unavailable to Plaintiffs as a remedy.

19
20 ***C. Washington Business Opportunity Fraud Act (“BOFA”)***

21 PFI moves for summary judgment dismissal of Plaintiffs' claim
22 under the BOFA. To date, no Washington appellate court has published
23 an opinion construing the BOFA (RCW 19.100 et seq.), originally
24 enacted in 1981. The BOFA's legislative declaration states:

25 The legislature finds and declares that the widespread and
26 unregulated sale of business opportunities has become a
common area of investment problems and deceptive practices
in the state of Washington. As a result, the provisions of

1 this chapter are necessary to counteract the potential
2 negative impact of the sale of business opportunities upon
the economy of the state.

3 RCW 19.110.010. Thus, it appears the BOFA is designed to regulate
4 the sale of business opportunities. A "business opportunity" means
5 the "sale or lease of any product, equipment, supply, or service
6 which is sold or leased to enable the purchaser to start a
7 business[.]" RCW 19.110.020(1). PFI moves for summary judgment
8 dismissal of Plaintiffs' claim under the BOFA on the basis that PFI
9 was not the seller of Plaintiffs' distributorships.

10 "Seller" is not defined in the FIPA, the BOFA, or the Washington
11 Consumer Protection Act. Plaintiffs point the Court to related words
12 defined in the FIPA at RCW 19.100.010:

13 (15) "Sale or sell" includes every contract for sale,
14 contract to sell, or disposition of a franchise.

15 (16) "Offer or offer to sell" includes every attempt or
16 offer to dispose of or solicitation of an offer to buy a
franchise or an interest in a franchise.

17 Relying on these definitions, Plaintiffs argue PFI should be
18 considered the seller of the distributorships even though it was not
19 the actual owner of the rights sold. In response, PFI points to the
20 Consignment Agreement and argues the BOFA is inapplicable because PFI
21 did not sell or lease anything to Plaintiffs. The Consignment
22 Agreement clearly provides that "Consigned Products shall be
23 consigned to consignee ... for sale to and delivery to retail
24 stores." Further, PFI notes that the proceeds from the sale of the
25 distributorships were used to pay bank loans and other debts and the
26 remainder was returned to Mr. Spangler and Mr. Godwin. Thus, PFI

1 argues it was not the "seller" of the distributorships for purposes
2 of the BOFA.

3 Plaintiffs also attempt to define PFI as a "seller" by relying
4 on case law from other specialized areas of the law. First,
5 Plaintiffs point to *Shinn v. Thrust IV, Inc.*, 56 Wash. App. 827, 851,
6 786 P.2d 285, 299 (Div. 1, 1990), wherein the court noted that under
7 the Washington State Securities Act, a party is a "seller" if his or
8 her acts were a "substantial contributive factor in the sales
9 transaction." Relying on this definition, Plaintiffs argue PFI was
10 the seller because it was active in every step of the process of
11 selling the distributorships and excluded the prior owners from the
12 sales. However, the Court determines the statutory definition of
13 seller under the Washington State Securities Act is inapplicable to
14 Plaintiffs' action under the BOFA. Second, Plaintiffs point to
15 *Carter v. Gugliuzzi, et al.*, 168 Vt. 48, 49, 716 A.2d 17 (1998),
16 where the Vermont Supreme Court found that a real estate broker was a
17 "seller" within the meaning of the Vermont Consumer Fraud Act. The
18 Court determines this *Vermont* case is inapplicable because Plaintiffs
19 have not shown PFI qualifies as a seller under Washington's Consumer
20 Protection Act. Third, Plaintiffs point to *Smith v. Dept. of*
21 *Business Regulation, Div. of Land Sales, Condominiums and Mobile*
22 *Homes*, 504 So.2d 1285, 1286 (Fla. App. 1 Distr. 1986), a case that
23 was decided under a Florida Statute dealing specifically with
24 vacation and timeshare plans. The Court is not convinced this case
25 is relevant or analogous to the present case.

26 The Court concludes Plaintiffs have failed to submit evidence

1 creating a material issue of fact with respect their claim under the
2 BOFA. The evidence shows that Mr. Goodwin, the prior owner of Mr.
3 Atchley's distributorship, "owned exclusive rights to sell Pepperidge
4 Farm, Inc. products in the Spokane Valley and Northern Idaho areas
5 for three and a half years" before his route was sold to Mr. Atchley.
6 (Ct. Rec. 143, at ¶ 1). Although Mr. Godwin acknowledges that PFI
7 was significantly involved in the sale of Mr. Godwin's route, his
8 affidavit establishes that he personally made the decision to
9 terminate his Consignment Agreement and sell his route, and that he
10 was the owner of the all of the rights eventually sold to Mr.
11 Atchley. The declaration of Mr. Atchley does not establish any fact
12 to the contrary. Further, Mr. Gilroy's declaration states that he
13 believed he bought his distributorship from Mr. Spangler, not PFI,
14 see Gilroy Dep., 52:15-20, and Plaintiffs have not submitted any
15 evidence establishing that Mr. Spangler was not the prior owner of
16 Mr. Gilroy's distributorship. Therefore, with respect to the BOFA,
17 the Court determines PFI was not the seller of Plaintiffs'
18 distributorships. Rather, the evidence submitted establishes only
19 that PFI was acting as an intermediary protecting its interest as a
20 guarantor. Accordingly, PFI's motion for summary judgment dismissal
21 of Plaintiffs' claim under the BOFA is granted.

22 ***D. Misrepresentation***

23 To prevail on a claim of negligent misrepresentation under
24 Washington law, Plaintiffs must prove by clear, cogent, and
25 convincing evidence that they justifiably relied on information PFI
26 negligently misrepresented. *Lawyers Title Ins. Corp. v. Baik*, 147

1 Wash.2d 536, 545, 55 P.3d 619, 623 (2002). However, failure to
2 perform promises of future conduct cannot alone establish the
3 requisite negligence for negligent misrepresentation. *Id.* at 182,
4 876 P.2d at 448. "This is because of the absence of any false
5 representation as to a presently existing fact, a prerequisite to a
6 misrepresentation claim." *Id.*

7 With respect to their claim for negligent misrepresentation,
8 Plaintiffs allege PFI's agents knowingly or negligently
9 misrepresented their distributorships "would be profitable" and they
10 "could expect weekly profit." Complaint, ¶¶ 3.2, 6.2, 7.11; Aff.
11 John Atchley, Dec. 6, 2004, ¶ 4. Each Plaintiff alleges "the weekly
12 wholesale volume is nowhere near the amount that PFI led him to
13 believe he could expect." Complaint, ¶ 4.8. Plaintiffs also allege
14 PFI "knew the communication regarding the expected weekly profit was
15 false, or [was] negligent in obtaining and communicating the false
16 figures." *Id.*, ¶ 6.4. Plaintiffs further allege PFI "knowingly
17 and/or negligently represented that Pepperidge Farm had an unlimited
18 stale policy, and would not charge back for any stale products."
19 *Id.*, ¶ 6.5.

20 PFI moves to dismiss Plaintiffs' claim on the basis that all of
21 Plaintiffs' allegations of misrepresentation refer to future conduct
22 and cannot form the basis for a negligent misrepresentation claim.
23 In their response memorandum, Plaintiffs failed to cite to any
24 specific misrepresentations of existing facts upon which they rely to
25 support their claim for negligent misrepresentation. However, during
26 oral argument, Plaintiffs argued their affidavits support their

1 misrepresentation claim.

2 Plaintiffs' allegations regarding PFI's representations with
3 respect to the distributorships' expected weekly wholesale volume and
4 PFI's representations that the distributorships "would be profitable"
5 and that Plaintiffs "could expect weekly profit," refer to promises
6 of future conduct, which alone cannot establish the requisite
7 negligence for a misrepresentation claim. *Lawyers Title Ins. Corp.*,
8 147 Wash.2d at 545, 55 P.3d at 623. Plaintiffs' allegation that PFI
9 promised it would not charge back for any stale products also refers
10 to a promise of future conduct. However, Plaintiffs' allegation that
11 PFI represented, at the time the Consignment Agreements were signed,
12 that it had an unlimited stale policy does not refer merely to PFI's
13 failure to perform future conduct. Complaint, ¶ 6.5. Rather, this
14 allegation refers to an alleged misrepresentation of an existing
15 fact. Although the Stale Policy was purportedly in effect at the
16 time Mr. Gilroy purchases his distributorship, Mr. Gilroy alleges he
17 was not notified of the policy until seven weeks after purchasing his
18 distributorship. Aff. Gilroy in Support of Renewed Motion for
19 Summary Judgment, ¶ 6 (Ct. Rec. 123). Mr. Gilroy contends that when
20 he purchased his distributorship he was "directed to stock store
21 shelves full of product" and told he "would not be held responsible
22 or accountable for PFI packages that had to be removed when they
23 became stale." *Id.*, ¶ 5. Mr. Gilroy further alleges he would not
24 have purchased the distributorship if he had known about the Stale
25 Policy at the time of his investment. *Id.*, ¶ 7. Mr. Atchley
26 contends that the PFI employees who were responsible for training

1 told him to "completely stock [the] shelves and keep them full at all
2 times." Aff. Atchley in Support of Renewed Motion for Summary
3 Judgment, ¶ 5 (Ct. Rec. 122). Mr. Atchley asserts that he was told
4 he would "not be held responsible for any product that had to be
5 removed when [it] became stale." *Id.* Further, Mr. Atchley alleges
6 he did not learn that the Stale Policy was actually enforced until
7 five months after he purchased his distributorship. *Id.*, ¶¶ 6-7.
8 Moreover, Mr. Atchley alleges he would not have purchased his
9 distributorship if he had known the Stale Policy was actually
10 enforced by PFI. *Id.*, ¶ 8. The Court determines Plaintiffs'
11 allegations, if proven, are sufficient to establish the requisite
12 negligence for a claim for negligent misrepresentation. Accordingly,
13 PFI's motion for summary judgment dismissal of Plaintiffs' claim for
14 negligent misrepresentation is denied in part and granted in part.

15 ***E. Breach of Contract***

16 Washington courts follow the objective manifestation theory of
17 contracts. *Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wash.2d
18 493, 503, 115 P.3d 262, 267 (2005). Under this approach, the Court
19 attempts to define the parties' intent by focusing on the objective
20 manifestations of the agreement, rather than on the unexpressed
21 subjective intent of the parties. *Id.* The Court imputes an
22 intention corresponding to the reasonable meaning of the words used.
23 *Id.* "Thus, when interpreting contracts, the subjective intent of the
24 parties is generally irrelevant if the intent can be determined from
25 the actual words used." *Id.* Words are generally given their
26 "ordinary, usual, and popular meaning unless the entirety of the

1 agreement clearly demonstrates a contrary intent." *Id.* The Court
2 does "not interpret what was intended to be written but what was
3 written." *Id.*

4 Here, Plaintiffs' breach of contract claim is based on their
5 claim that the Stale Policy amounts to change in a course of
6 performance. However, the Consignment Agreement does not contain any
7 product return percentages or any obligation on PFI's behalf to
8 provide some type of relief for stale products (i.e. a fixed policy).
9 The Consignment Agreement defines "Stale Products" as "Consigned
10 Products whose shelf life has expired, as determined by Bakery's
11 stale policy existing from time to time." Thus, interpreting only
12 what is written, PFI's Stale Policy is flexible, exists from time to
13 time, and is subject to change at any time. The Court concludes
14 Plaintiffs cannot base a breach of contract action upon changes to a
15 policy that is, by its own terms, subject to change. Therefore,
16 PFI's motion for summary judgment is granted with respect to
17 Plaintiffs' breach of contract claim.

18 **IV. CONCLUSION**

19 PFI's motion for summary judgment dismissal of Plaintiffs' FIPA
20 claim is granted because Plaintiffs have not established they paid a
21 franchise fee. Plaintiffs' claim under the BOFA is dismissed on
22 summary judgment because PFI is not a seller under the BOFA. With
23 respect to Plaintiffs' claim for breach of contract, PFI's motion for
24 summary judgment is granted. With respect to Plaintiffs' claim for
25 negligent misrepresentation, PFI's motion for summary judgment is
26 granted in part and denied in part. Plaintiffs' allegations

1 regarding PFI's representations concerning its Stale Policy, if true,
2 are sufficient to establish the requisite negligence for a claim for
3 negligent misrepresentation. Accordingly,

4 **IT IS HEREBY ORDERED:**

5 1. Defendant's Motion for Summary Judgment Dismissal of
6 Plaintiffs' claims (**Ct. Rec. 133 in CV-04-452-FVS; Ct. Rec. 128 in**
7 **CV-04-453-FVS**) is **GRANTED IN PART AND DENIED IN PART.**

8 2. Plaintiffs' Motion for Summary Judgment (**Ct. Rec. 118 in CV-**
9 **04-452-FVS; Ct. Rec. 113 in CV-04-453-FVS**) is **DENIED.**

10 3. Defendant's Motion to Strike (**Ct. Rec. 146 in 04-452; Ct.**
11 **Rec. 141 in 04-453**) is **MOOT.**

12 **IT IS SO ORDERED.** The District Court Executive is hereby
13 directed to enter this Order and furnish copies to counsel.

14 **DATED** this 20th day of March, 2006.

15
16 s/ Fred Van Sickle

17 Fred Van Sickle

18 United States District Judge
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